Information and Privacy Commissioner/ Ontario

Municipal Freedom of Information

Ontario Bar Association
Institute 2003

Municipal Section
Metro Toronto Convention Centre

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March 20, 2003

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Introduction

Freedom of information laws have provided a window on governments at the provincial level since January 1988 (the *Freedom of Information and Protection of Privacy Act*) and the municipal level since January 1991 (the *Municipal Freedom of Information and Protection of Privacy Act*). The two laws are quite similar to each other, establishing broad public rights of access and corresponding obligations on governments to disclose information in the public interest.

The underlying principles of the law are reflected in the section 1 purpose clause, which reads:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

The Supreme Court of Canada, in commenting on a similar purpose clause contained in the federal *Access to Information Act* stated that the overarching purpose of freedom of information legislation is:

> ... to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.
>
> (La Forest, J. in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at 432)

In this paper I will review the basic rules of Ontario's freedom of information laws, with specific emphasis on the municipal statute (the *Act*), which applies to municipal corporations and other public bodies operating in the municipal sector, such as school boards and police services boards.

Routine Disclosure

The law is designed to facilitate the disclosure of government-held information. As such, a member of the public need not demonstrate why a particular record or information should be disclosed. The onus is on the government body to establish why a record should not be released, otherwise the presumption of disclosure prevails.

As such, institutions (the term used in the *Act* to define public bodies) are strongly encouraged to provide routine disclosure of information on an informal non-statutory basis, and to proactively disseminate information to the public even in the absence of a formal or informal request. In many cases, an institution will provide the information in accordance with a routine disclosure practice, or simply because it can see no reason to withhold it. The statute recognizes that these dissemination practices existed long before the law came into effect, and should continue to exist, unless personal information is involved.

We in the Office of the Information and Privacy Commissioner (the IPC) refer to this process as "RD/AD" - Routine Disclosure/Active Dissemination. A number of municipalities, including the City of Mississauga are strong proponents of RD/AD, and you can find useful information about RD/AD practices in various publications available on our Web site (www.ipc.on.ca).

An example of an effective RD/AD initiative is the City of Toronto's restaurant inspection reporting program. Until a few years ago, members of the public had to make formal requests for inspection results for individual restaurants. Now these results are posted to the City's Web site and actively disseminated to the public on an informal basis, even in the absence of a request.

Making a Request

If information is not obtained informally, or if that avenue is not considered appropriate, an individual can start the formal freedom of information process by making a written request to the institution that has the records in question. (s. 17)

A "record" is defined in section 2 of the *Act* quite broadly to mean "any record of information however recorded, whether in printed form, on film, by electronic means or otherwise" and includes:

- correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof

A "record" also includes a document that doesn't exist, but is capable of being produced from a machine-readable record by means of computer hardware or software. However, Regulation 823 provides that, if the process of producing the record would "unreasonably interfere with the operations of an institution", it is not considered to be a "record" for the purposes of the *Act*.

The *Act* applies to "records" as opposed to "information", so requesters are not generally entitled to have their questions answered. That being said, institutions are often prepared to provide answers or to help individuals formulate questions into proper requests for records.

It is generally not necessary to describe records precisely, since in many cases, a requester will not be in a position to know exactly what records contain the sought-after information. Thus, categorical descriptions may suffice, for example, "all records relating to a meeting attended by the Commissioner of Planning in 2000 re: the development of the City's new Official Plan". Institutions may maintain directories listing the type of records they hold, which could prove useful in formulating and focusing a request.

The provincial *Act* includes a statutory obligation on the part of an institution to assist a requester to properly formulate a request if it is unclear. For some reason this provision was not included in the municipal *Act*, but I would expect it is common practice for municipal governments to discuss requests to ensure that the scope is clear.

The purpose of the request is generally not relevant, so the requester does not need to explain his or her reasons for making the request, or how the records will be used. The identity of the requester is also meant to be closely held by the institution, and only disclosed within the organization on a "need to know" basis. The expectation is that decisions will be made based on the application of the various exemptions in the *Act*, regardless of whether the requester is a private citizen, a member of the media, a lawyer representing an unknown client, or some other individual or organization. Disclosure to an individual requester is also tantamount to "disclosure to the world".

Obviously, the situation is different when an individual is making a request under the *Act* for access to his or her own personal information, where identity is relevant and decisions on access are specific to the individual requester.

A request can be made by an estate trustee if the record relates to the administration of the estate, by individuals exercising a power of attorney, and by the custodial parent of a child under the age of 16 (s. 54).

Custody or Control

Access rights are extended to all records "in the custody or under the control of an institution"(s.4). (*Walmsley v. Ontario (Attorney General)*, (1997), 34 O.R. (3d) 611 (C.A.), and *Ontario (Criminal Code Review Board) v. Hale, Inquiry Officer, et al.*, (1999), 47 O.R. (3d) 201 (C.A.))

It is important to note that only custody *or* control is required, not both. This is particularly important in the context of various privatization or alternative service delivery programs implemented by government organizations. While an institution may no longer have physical custody of a record that has been transferred to a private sector agent under contract (e.g. records given to a collection agency for the purpose of chasing debtors), it does not necessarily follow that the institution has given up control of the records. Requesters in this context should continue to submit requests to the institution, as they would have before the alternative service delivery program was put in place, and the right of access will be determined on the basis of whether the institution has retained control of the records at issue.

Fees

Since 1996, a mandatory $5 fee is charged for each request, even a request for access to one's own personal information (Regulation 823). Section 45 of the *Act* and Regulation 823 also permit institutions to charge for costs associated with locating records and preparing them for disclosure, as well as photocopying and certain computer-related charges. Search and preparation fees are not chargeable for personal information requests.

Prior to 1996, requesters were permitted 2 hours of free search time, but this was eliminated when the fee regime was implemented. If, in assessing a request, an institution estimates that it will involve fees in excess of $25, it must provide the requester with a fee estimate. If the estimated charges are more than $100, the institution can require the requester to pay 50% of the fee before it takes any further steps to respond to the request. This serves as an incentive for requesters to carefully consider the scope of their requests to avoid charges that can be prohibitive in cases involving records that are voluminous or difficult to locate.

A requester can ask for a fee waiver, and an institution must consider whether it is fair and equitable to do so, after considering issues such as financial hardship or whether disseminating the information in the record would benefit public health or safety. (s. 45(4))

Both fees and fee waiver decisions are appealable to the IPC.

Timing

In most cases, requests must be answered within 30 days (s. 19). The process can take longer in cases involving voluminous records (s. 20), or where the records involve other parties who need to be notified and given an opportunity to make submissions before an access decision is made (s. 21). Ultimately, the institution must make a decision on access within the required timeframe, and must provide the records unless an exemption or exclusion applies. If the institution makes no decision within the allotted time, the institution is deemed to have refused access, and the requester can appeal this deemed refusal to the IPC.

Grounds for Refusal

Exemptions

Exemptions are similar in all FOI statutes. Ten exemptions are included in the municipal *Act*:

- Draft by-laws or draft private bills, and any records that would reveal the substance of deliberations of a properly constituted in camera meeting, unless the draft document or the subject matter of the in camera deliberations has been considered at a public meeting (s. 6)
- Advice or recommendations of an officer or employee or a consultant retained by an institution, subject to a number of listed exceptions (s. 7)
- Law enforcement records (s. 8)
- Records that would reveal information received in confidence from another level of government, unless that government consents (s. 9)
- Third party commercial information, if that information has been supplied to the institution in confidence and if disclosure would result in harms specified in the exemption (s. 10)
- Records containing information having monetary value to the institution or where disclosure of the records could prejudice the institutions economic interests (s. 11)
- Records protection by solicitor-client privilege (s. 12)
- Records containing information that could seriously threaten the safety or health of an individual (s. 13)
- Personal information of individuals other than the requester, unless the individuals have consented, the personal information is in a public record or disclosure is authorized by statute, or if disclosing the information would not constitute an unjustified invasion of privacy (s. 14)
- Information that has been published or is currently otherwise available to the public or will be made available within 90 days of the request (s. 15)

Most exemptions are harms based, and can only be claimed if the institution has concluded that disclosure "could reasonably be expected to" result in the identified harm. This does not apply to solicitor-client privilege, *in camera* records, advice and recommendations, certain law enforcement exemptions, and personal information of individuals other than the requester. (For a review of how this phrase has been interpreted, see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Minister of Labour (Office of the Worker Advisor) v. Holly Big Canoe and John Doe*, (1999) 46 O.R. (3d) 395 (C.A.)).

All but three exemptions are discretionary, meaning that institutions are permitted to disclose records even if they are satisfied that the requirements of the exemption claim are present, and institutions are required to exercise discretion in each instance.

Third party commercial information, personal information of others, and information received in confidence from other governments are protected by mandatory exemptions. If the requirements of these exemptions are established, an institution is precluded from releasing this information.

In the case of individuals seeking access to their own personal information, all exemptions are discretionary (s. 38). This recognizes the higher right of access under the *Act* when dealing with one's own personal information.

Exclusions

Institutions can also deny access on the basis of an exclusion, as distinct from an exemption. In other words, records may be considered to be outside the jurisdiction of the *Act* because the *Act* or another statute expressly says so. The municipal *Act* specifically excludes:

- Records placed in the archives of an institution by or on behalf of a person or organization other than an institution (s. 52(2))
- Certain labour relations or employment-related records relating to government's workforce (s. 52(3))

The provincial *Act* also excludes certain archived records, categories of mental health records and court records (s. 65 of the provincial *Act*).

In addition, records may be excluded from the scope of the *Act* if they are not in the custody or under the control of the institution, if another statue specifically overrides the *Act* or if the federal legislative paramountcy applies.

Appeal Rights

Any decision under the *Act* can be appealed to the IPC (s. 39). This includes:

- Denial of access to either general government records or personal information
- Fee or fee waiver
- Adequacy of searches for responsive records
- Transfer of a request
- Adequacy of the institution's decision letter
- Time extension
- Deemed refusal

The appeal must be in writing and must be filed with the IPC within 30 days of receiving the institution's decision (s. 39(2)).

All appeals with the exception of those relating to a request for one's own personal information require a $25 appeal file. Personal information appeals cost $10. (Regulation 823)

Information and Privacy Commissioner

The Information and Privacy Commissioner is an independent officer of parliament, appointed under the provincial *Act* on address of the Legislative Assembly. The term of appointment is 5 years, and can be renewed. The Commissioner can be removed only for cause, with the approval of the House (s. 4 of the provincial *Act*).

The Commissioner has statutory authority to appoint officers and staff and to rent premises and obtain a budget from the Board of Internal Economy. Staff are not part of the Ontario Public Service, but receive salaries and benefits equivalent to civil servants (s. 8 and s. 9 of the provincial *Act*). The IPC budget is subject to audit by the Provincial Auditor (s. 9(2) of the provincial *Act*).

The Commissioner has four distinct statutory roles and responsibilities:

- Hear and dispose of appeals (s. 39)
- Investigate privacy complaints
- Conduct research on access and privacy issues and provide advice on proposed government legislation and programs (s. 46)
- Conduct public education (s. 46)

Appeals Process

The burden of proof that an exemption or exclusion applies rests with the institution (s. 42). In the case of third party appeals, where a business or individual is resisting an institution's decision to disclose records in which they have an interest, the burden falls on these third parties.

The IPC has broad discretion in the design of its appeals process. It may dismiss an appeal on a summary basis in certain contexts (s. 39) and may appoint a mediator to investigate and attempt to settle the appeal informally (s. 40).

All appeals must be disposed of by the IPC, and any that do not settle proceed through the formal inquiry process outlined in the *Act* (s. 43)

Intake

All appeals are screened at the Intake stage. The Registrar and Intake Analysts have delegated authority from the Commissioner to dismiss an appeal on a summary basis if the:

- Appellant has not established a reasonable basis for concluding that a record exists
- Issue is trivial, moot or has already been decided
- *Act* does not apply

Deemed refusal appeals are also dealt with at the Intake stage. An Intake Analyst will give an institution a short amount of time to issue a proper decision letter to the appellant, but if no decision is forthcoming, the Intake Analyst has delegated authority to issue an order requiring a decision.

Approximately 20% of appeals are resolved at the Intake stage, within 20-30 days.

Mediation

The IPC strongly endorses mediation as its preferred method of dispute resolution, and virtually all appeals that are not resolved at the Intake stage are streamed to the Mediation stage.

The Mediator's responsibilities under the *Act* are two-fold: (1) to investigate the circumstances of the appeal; and (2) to try to effect a settlement.

As part of the investigative role, the Mediator will clarify the records and exemption claims at issue, as well as the relevant facts and circumstances. Institutions are required to provide copies of all records to the IPC (*Ontario (Minister of Health) v. Big Canoe*, unreported, Toronto Doc. 111/94 (June 29, 1994, Div. Ct.), *aff'd* [1995] O.J. No. 1277 (C.A.)), and they are reviewed in detail by the Mediator. Care must be taken to ensure that the content of records in dispute is not revealed, which

limits the scope for more traditional face-to-face mediation. Most mediation is conducted by telephone, one party at a time, although teleconferencing and face-to-face sessions are becoming more frequent, particularly in cases where the confidentiality of the contents of the records can easily be assured.

The statute creates a rights-based mediation model, but we find that interest-based approaches are frequently effective, particularly in cases where an appellant does not require an actual copy of the record in dispute.

Approximately 55% of appeals are settled at the Mediation stage, and the others that proceed to the Adjudication stage are often narrowed through mediation.

Adequacy of search/fee appeals

The IPC has a dedicated process for appeals where the sole issue is either fees or the adequacy of an institution's search for responsive records.

This process involves an oral hearing. An Adjudicator sets a date for the hearing at the outset of the process, approximately six weeks after the appeal is received. At the same time, a Mediator is appointed to try to settle the appeal up to the hearing date. If settlement does not occur, the hearing proceeds and an order with reasons is issued by the Adjudicator.

The vast majority of these appeals settle without a hearing.

Adjudication

Appeals that do not settle at either the Intake or Mediation stages are transferred to the Adjudication stage for any inquiry.

The Commissioner and her delegates (i.e. Assistant Commissioner and Adjudicators) have broad investigative powers during an inquiry (s. 41), including the power to:

- Enter premises
- Compel production of documents
- Examine individuals under oath

The *Statutory Powers Procedure Act* does not apply to inquiries under the *Act* (s. 41(2)), however general principles of administrative fairness are built into the IPC inquiry policies and procedures. The IPC's *Code of Procedure* and *Practice Directions* describe the inquiry process in detail, and are available on the IPC Web site.

Inquiries are conducted in writing.

The assigned Adjudicator prepares a Notice of Inquiry, which summarizes the background, describes the records and sets out the issues to be dealt with in the inquiry. The Notice is sent to the party with the burden of proof (generally the government institution), who then submits written evidence and argument for each issue.

The *Act* provides that no party is entitled to have access to representations made to the IPC by another party (s. 41(13)) (*Grant v. Cropley*, 143 O.A.C. 131 (Div. Ct)), however the IPC's policies and procedures for submitting and sharing representations are designed to ensure maximum disclosure, subject to valid confidentiality considerations (*Toronto District School Board v. Laurel Cropley and the Information and Privacy Commissioner/Ontario and Humber Heights of Etobicoke Ratepayers Inc.*, [2002] O.J. No. 4631 (Div. Ct.).

Representations will be shared unless:

- They would reveal the substance of a record claimed to be exempt
- The withheld portions would be exempt if contained in a record subject to the *Act*
- The information should not be disclosed for *Wigmore*-based confidentiality reasons

(Taken from *IPC Practice Direction 7*)

If an institution establishes a *prima facie* case for its decision to deny access, the non-confidential representations and Notice of Inquiry are then sent to the appellant for response. On occasion, the appellant's representations are provided to the institution by way of reply.

After receiving all representations, the Adjudicator issues an order with reasons (s. 43(1)). All outstanding issues must be dealt with in the order, and it may contain any appropriate terms and conditions (s. 43(3)).

An order of the IPC is final and binding on all parties, subject only to judicial review.

Approximately 25% of appeals are resolved at the Adjudication stage. A total of more than 2100 provincial orders and 1600 municipal orders have been issued by the IPC. They are all accessible on the IPC Web site, together with a subject and a section index. Orders are also available by subscription through QL Systems.

Judicial Review

A total of 63 judicial reviews have been heard by Divisional Court since the *Acts* came into force, which represents less than 0.5% approximately 13,000 appeals dealt with by the IPC since the *Acts* came into force. Ten of these cases have proceeded to the Court of Appeal, but no case has been dealt with to date by the Supreme Court of Canada. One application for leave to appeal to the Supreme Court is pending.

Courts have given a high degree of deference to decisions of the IPC, despite the absence of a privative clause in the *Act*, in recognition of the tribunal's demonstrated expertise.

The standard of review for decisions within the core responsibilities of the IPC has been set by the court as "*reasonableness simpliciter*" (*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, (1998), 164 D.L.R. (4th) 129, See also *Ontario (Minister of Finance) v. Higgins*, (1999), 118 O.A.C. 108 (C.A.), leave to appeal denied [1999] S.C.C.A. No. 134). A "correctness" standard has been reserved for jurisdictional issues (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 507) and the application of the solicitor-client privilege exemption claim (*Attorney General v. Big Canoe* [2002] O.J. No. 4596 (C.A.)).

Offences

The *Act* provides a number of offences (s. 48), including:

- Wilfully maintaining personal information in contravention of the *Act*
- Making a request for access to one's own personal information under false pretences
- Wilfully obstructing the IPC
- Wilfully making a false or misleading statement or attempting to mislead the IPC
- Wilfully failing to comply with an IPC order

The *Act* is silent on who would prosecute an offence, and some prosecutions require the consent of the Attorney General (s. 48(3)).

A person found guilty of an offence is liable for a fine up to a maximum of $5,000 (s. 48(2)).

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